SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-998

TOM PARKER and MORRIE PARKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Questions Presented

1. Whether petitioners have standing to attack the constitutionality of California Penal Code section 288a on its face.

2. Whether California Penal Code section 288a is facially unconstitutional.

Statement of the Case

This case arises from the consolidation of three separate prosecutions in the Los Angeles Superior Court. The first case, No. A270417, was a trial by jury in which petitioners were found guilty of one count of conspiracy to commit the crime of oral copulation,

a violation of section 182 of the California Penal Code, and one count of oral copulation in violation of section 288a of the California Penal Code. The conspiracy charge was declared to be a misdemeanor, and probation was granted on both counts for a term of five years upon condition, among others, that petitioner Morrie Parker pay a fine of $750 and petitioner Tom Parker pay a fine of $500.

Case No. A274764 was submitted on the testimony contained in the transcript of the preliminary hearing and resulted in a finding of guilt of petitioner Tom Parker on 13 counts of violation of section 288a of the Penal Code. Probation was granted for a period of five years on condition, among others, that petitioner Tom Parker pay a fine of $500.

Case No. A278592 was also submitted on the transcript of the preliminary hearing and resulted in a judgment of guilt of petitioner Tom Parker on 12 counts of violation of section 288a of the Penal Code. Probation was granted for a period of five years on condition, among others, that petitioner Tom Parker pay a fine of $500.

The resulting appeals from these three convictions involved one count of conspiracy to commit oral copulation in violation of section 182 of the Penal Code and 26 counts of oral copulation in violation of section 288a of the Penal Code. These judgments of conviction were affirmed by the Court of Appeal of the State of California, Second Appellate District, Division One, on July 31, 1973. A petition for hearing by the Supreme Court of the State of California was denied on September 26, 1973.

Statement of Facts

The following facts are taken from Case No. A270417, which was tried by a jury. They are presented in condensed form as representative of all three consolidated cases here being challenged.

In response to an advertisement in Daily Variety magazine offering the sale of 49 feature length, 16 millimeter adult films, Los Angeles Police Officer William Riddle, operating in an undercover capacity, telephoned the number listed and arranged a meeting with someone responding as "Tom Parker." On Saturday, February 27, 1971, Officer Riddle arrived at 310 North San Vicente and met petitioner Tom Parker, who soon led Officer Riddle through his suite of offices to a room which contained numerous cans of film and films on a table which also contained a moviescope. The film being edited depicted a large living room containing six couples, five of these couples being male-female and one couple being female-female. These six couples were engaged in various sexual activities, most of which involved oral copulation.

In one scene a male who appeared to be a narrator came onto the set and said something to the effect, "Hello, I'm an artist," explaining that his business was erotic art. He referred to erotic pictures around the room, and then said, "I hire these people to come and do these things, and they're an inspiration for my art." As he narrated and walked among the group, for example, he patted one of the females on the buttocks and said, "Are you having a good time?" and she said, "Oh, wonderful." Also during this portion there were numerous groans and almost animal grunts and slurping noises.

On one occasion one of the males who was in a partial standing position adjacent to a couch, took a glass of liquid and poured it on the anus of one of the females, who simultaneously had her mouth over his penis. After doing this, he leaned over her and began to lick and suck the liquid on her anus.

Petitioner Tom Parker stated that he had recently purchased a theatre called the Yale in Santa Monica which had been in operation for several months and had been very successful financially. He said that even more recently he had purchased the Cave Theatre in Hollywood, and that when he became financially successful or solvent, reaching an income of $13,000 a week, he tooks his sons, Morrie [Petitioner Morrie Parker] and Rick, as partners to manage the theatres while he produced the movies.

Officer Riddle told petitioner Tom Parker that after seeing the films, he would have to meet with his financial backers and discuss the terms of the sale. Petitioner Tom Parker provided a list of the various titles in the inventory, saying that he had "expensed out the film" and that with the $250,000 he was asking he intended to purchase 10 theatres across the nation in which to show his films.

On Thursday, March 4, at approximately 2:30 p.m., Officer Riddle met petitioner Tom Parker at 663 North Berendo Street in Los Angeles. Officer Riddle was led to that address by petitioner Morrie Parker and Rick Parker. The Berendo Street address was a sound stage. Petitioner Tom Parker was "manning a movie camera." There were numerous actors, actresses, or other persons standing around. Petitioner Tom Parker was giving instructions to three persons on the set, and Vern

Barney was assisting with electrical equipment and a directional microphone. Petitioner Tom Parker told a man known to be Tony Deluca to sit on a stool next to a sign which read "Tony's Erotic Boutique." He gave directions to a female named Shelly Silver to be rummaging through some clothes on a rack, and to another female by the name of Sharon Fields, who was in what appeared to be a clothes changing booth.

The camera was running and the participants said exactly what petitioner Tom Parker told them to say. Tony Deluca stated, "Hello. My name is Tony." Shortly thereafter a second scene started wherein Sharon Fields came out of the booth and said, "You're not going to fuck that girl." Then Shelly Silver said, "What makes you think I want to fuck him anyway." Deluca then said, "They're really kidding. They both love me." Shortly, thereafter, petitioner Tom Parker took a break and he with his two sons, Rick and petitioner Morrie Parker, accompanied Officer Riddle to a nearby restaurant where they discussed the sale of films.

Officer Riddle subsequently returned to the sound stage at 10:00 p.m. with petitioners' attorney. Upon entering the sound stage, Office Riddle saw what appeared to be a dinner break in progress. The attorney stated that he should draw up a rough contract of some kind, and petitioner Tom Parker said that he would talk to him the following day.

Officer Riddle observed the activity on the sound stage that evening. The scene involved a single bed and two females, Shelly Silver and Rebecca Moreland. Petitioner Tom Parker called the cast together and instructed the two women to assume the positions they had been in prior to the break. To Shelly he stated,

"No, you were not wearing boots, you were completely nude." He instructed Barney on lighting and the sound apparatus. He then gave specific instructions to the nude women, such as where they were to sit and what positions they were to assume. He told them to insert their fingers into each other's vagina during the course of the next few minutes. He instructed them to perform various acts, including copulation, sucking each other's breasts, and masturbating each other using several fingers. He instructed them specifically how to kiss each other's vagina and breasts. On numerous occasions he would tell them how to position their legs and their faces.

As the film was rolling, petitioner Tom Parker would generally refrain from instructions. From time to time he would whisper instructions or stop the camera and tell them, "Now in the 'climax scene,' let your kisses be drooly." On one occasion Shelly Silver asked, "Can I say fuck now." Petitioner Tom Parker said, "Yes, why don't you say 'fuck me, fuck me' and you (referring to Rebecca) state, 'I am, I am.'" The two women did as instructed. At approximately 11:00 p.m., Officer Riddle walked over to petitioner Tom Parker while he was still filming and whispered that he was leaving.

On Saturday, Officer Riddle went to petitioners' offices with a search warrant and seized various evidence, including approximately 105 films.

ARGUMENT

I

Petitioners Do Not Have Standing to Attack the Constitutionality of Penal Code Section 288a on Its Face

Citing *Eisenstadt v. Baird,* 405 U.S. 438 (1972), petitioners claim the right to attack Penal Code section 288a on its face as "advocates of the rights of all those consenting adults in California who wish to engage in oral genital sex." (Pet. pp. 7-8.) The *Eisenstadt* decision provides an exception to the general rule that a litigant may not raise the constitutional rights of third parties. This exception depends upon the nature of the relationship between the litigant and those whose rights he seeks to assert and upon the impact of the litigation on third-party interest. *Eisenstadt v. Baird, supra,* 405 U.S. at 445-46. However, the interests of married persons, which petitioners seek to raise in their argument on the merits, will not be adversely affected by this litigation and there is no special relationship between petitioners and these third parties. Indeed, petitioners merely desire to avoid focusing upon the factual background of their commercial exploitation of sex.

It is clear that petitioners may not attack the constitutionality of section 288a on its face without reference to the details of the offense charged.

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines,* 362 U.S. 17, 21 (1960).

II

California Penal Code Section 288a Is Constitutional

Petitioners assert that California Penal Code section 288a is unconstitutional as being violative of the First, Ninth, and Fourteenth Amendments to the United States Constitution. (Pet. p. 5.) As a starting point, petitioners urge that given the zone of marital privacy created by *Griswold v. Connecticut,* 381 U.S. 479 (1965), the proscriptions of section 288a against oral copulation cannot constitutionally be applied to married people in the privacy of their bedroom. It has long been acknowledged that the right to privacy "encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing." *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 65 (1973). However, the *Griswold* decision and the right to privacy do not protect the commercial exploitation of sex. "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller v. California,* 413 U.S. 15, 25-26 (1973). It is precisely these sexploitation films which petitioners were making for public distribution when they arranged the acts of oral copulation for which they were convicted.

Petitioner Tom Parker is also involved in another prosecution based upon almost identical facts. In reversing the trial court's action terminating his prosecution, the Court of Appeal for the State of California said:

> "The conduct referred to is that pertaining to the hiring and directing of professional performers

> to engage in acts of oral copulation in a semi-public place recorded by the camera for distribution to the general public through the media of the cinema. It is a reasonable inference that all involved including respondent expected to reap a financial return from the enterprise. The conduct of defendant may be defined as a form of commercial vice and not normal and natural sexual activity of consenting adults in private. Therefore we do not regard defendant's conduct as involving the exercise of a fundamental personal right protected by the Fourteenth Amendment." *People v. Parker,* 33 Cal. App. 3d 842, 848 [109 Cal. Rptr. 354, 358] (1973).

California courts have consistently upheld the constitutionality of Penal Code section 288a, and both state courts and federal courts have recently reaffirmed that stand. The California Court of Appeal in *People v. Drolet,* 30 Cal. App. 3d 207, 211-212 [105 Cal. Rptr. 824] (1973), upheld application of Penal Code section 288a to consenting adults, ruling that penal statutes proscribing illicit sexual contacts constitute a legitimate and proper exercise of the police power. *See also People v. Hurd,* 5 Cal. App. 3d 865, 876-77 [85 Cal. Rptr. 718] (1970). A similar result has been reached by the Court of Appeals for the Ninth Circuit in *Shaw v. Pitchess,* 440 F. 2d 412, 413 (9th Cir. 1971), affirming *Shaw v. Pitchess,* 324 F. Supp. 781 (C. D. Cal. 1969).

We agree with Chief Justices Earl Warren and Warren Burger that there is "a right of the Nation and of the States to maintain a decent society." *Paris Adult Theatre v. Slaton, supra,* 413 U.S. at pp. 56-60.

Penal Code section 288a and its application to the commercial exploitation of prohibited sex acts by petitioners, is one of California's efforts to maintain that society.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Dated: This 5th day of March, 1974.

Respectfully submitted,

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